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No. 93-1418

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1993

In re ARTHUR CALDERON,
Warden of San Quentin Prison,
and DANIEL LUNGREN, Attorney General
of the State of California

RESPONDENT WADE'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF MANDAMUS TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTIONS PRESENTED

1. Should this Court issue a writ of mandamus where the court of appeals judges have already decided the underlying appeal and the state has failed to establish it is "clearly and indisputably" entitled to the writ?

2. Should this Court establish a rule requiring the Ninth Circuit to issue opinions in death penalty cases within 120 days of oral argument when such a rule would conflict with the duty of the court of appeals to give "full and fair consideration to all the issues presented in the case," and substantially disrupt the orderly administration of justice?

LIST OF PARTIES

Warden Arthur Calderon and California Attorney General Daniel Lungren are petitioners. Respondents are the United States Court of Appeals for the Ninth Circuit, and Circuit Judges William C. Canby, Jr., Stephen Reinhardt and Stephen S. Trott. Melvin Wade is the appellant in the habeas corpus appeal underlying this mandamus proceeding. Real party in interest and respondent Wade is represented below by special counsel, who was appointed by the Ninth Circuit on the singular issue of whether principal counsel had a conflict of interest, and who has been ordered by this Court to respond to the petition. Respondent Wade's undersigned principal counsel submits this Brief in Opposition to aid the Court in understanding the complexity of the underlying record.

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OPINIONS BELOW

Petitioner accurately recounts the dates of the opinions below except that on May 16, 1994, the Court of Appeals for the Ninth Circuit decided Wade v. Vasquez, No. 90-56332, 1994 U.S. App. Lexis 10762.

STATEMENT OF THE CASE

Respondent Wade filed his habeas corpus petition in federal district court on January 11, 1989. The district court ordered Wade to return to state court to exhaust his state remedies; on March 22, 1989 Wade filed a habeas corpus petition in state court. While that petition was pending, petitioners herein sought and obtained a new execution date of June 23, 1989. The state petition was denied on June 21, 1989, and on June 22, 1989, the district court stayed Wade's execution.

Respondent Wade filed his first amended petition in district court on August 8, 1989. After the answer, traverse and numerous pre-trial motions, an evidentiary hearing commenced on May 22, 1990 in district court. The petition for writ of habeas corpus was denied, Wade v. Vasquez, 752 F.Supp. 931 (C.D. Cal. 1990), the judgment was entered on October 19, 1990, and on November 16, 1990, Wade filed a timely notice of appeal. The district court issued and then filed the Certificate of Probable Cause on March 4, 1991.

After designation of the record, on January 22, 1991, the court of appeals ordered the transcripts filed by February 4, 1991. The court of appeals set a briefing schedule and

calendared oral argument for June 13, 1991. On or about February 6, 1991, respondent Wade moved for appointment of independent or special counsel in the court of appeals to present the issue of principal counsel's conflict of interest. The complete transcripts of the designated district court proceedings were not filed until April 12, 1991, and on April 15, 1991, the district court clerk provided uncorrected, and in large part unintelligible, transcripts to the parties. The court of appeals ordered on May 30, 1991, that a corrected record be provided and set a revised briefing schedule. After briefing by the parties, on May 31, 1991, the court of appeals appointed special counsel to assist respondent Wade in the presentation of his claim that principal counsel had a conflict of interest. It was not until sometime between August 5 and August 15, 1991, that undersigned counsel finally obtained the complete, corrected, certified transcripts.

On or about November 19, 1991, respondent Wade's 117-page opening brief on appeal was filed in the court of appeals. Briefing was completed by all counsel on or about February 13, 1992. On April 21, 1992 the court of appeals remanded the matter and directed the district court to receive evidence on respondent Wade's claim that principal counsel had a conflict of interest. After evidentiary proceedings, the district court order holding that there was no conflict of interest was entered on December 14, 1992. The district court issued a certificate of probable cause.

Supplemental briefing by all parties, raising additional issues joined in by two amicus curiae, was completed April 28, 1993; oral argument was presented to the court of appeals on June 16, 1993. On February 7, 1994 the court of appeals denied petitioner's motion for a decision within 60 days. On February 18, 1994 petitioner served the petition for writ of mandamus on respondent's principal and special counsel. By letter dated April 21, 1994, the Clerk of this Court directed special counsel to respond to the petition for mandamus on or before May 21, 1994. On May 16, 1994 the court of appeals rendered its decision in respondent's appeal.

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REASONS FOR DENYING THE WRIT

I

PETITIONERS HAVE FAILED TO DEMONSTRATE THAT THEY ARE CLEARLY AND INDISPUTABLY ENTITLED TO ISSUANCE OF THE WRIT

Respondent Wade respectfully suggests that the act petitioner seeks to compel by the writ of mandamus has already taken place. Therefore, the petition is moot.

Moreover, the petition fails to demonstrate that the court of appeals has refused to decide the underlying appeal.[1] See, Will v. Calvert Fire Ins. Co., 437 U.S. 655, 662 (1978). Rather than accurately and completely recount the procedural history of respondent Wade's federal habeas corpus litigation, petitioner conspicuously omits significant events in both the district court and court of appeals. Utilizing the misleading impression of periods of inactivity based upon these omissions, petitioner accuses the court of appeals of "dilatory actions" in a conclusory argument based solely upon hyperbole.

An accurate representation of the proceedings below belies petitioner's unfounded accusation that the court of appeals has refused to adjudicate the multiple constitutional claims in respondent Wade's first federal habeas corpus petition. Rather, the record demonstrates a conscientious and deliberate effort by the court of appeals to promptly resolve the matter "consistent with its duty to give full and fair consideration to

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[1] Respondent Wade's principal counsel hereby joins in special counsel's response and incorporates by this reference all arguments raised therein.

all of the issues presented in the case." In re Blodgett, 502 U.S. ___, 116 L.Ed.2d 669, 112 S.Ct. 674, 676 (1992).

Petitioner attempts to utilize this case to seek further relief from what petitioner claims to be the recurring problem of delays in capital cases. Although respondent Wade believes this to be an illusory claim, even were it not, respondent's appeal does not present a proper vehicle for resolving petitioner's claim. Contrary to the inaccurate impression created by petitioner's Statement of the Case, (Pet. at 7-8), the underlying appeal encompassed more than three issues. Respondent Wade's opening brief on appeal raises nine factually and/or legally complex constitutional claims. Further, the state court and district court denied several of respondent Wade's constitutional claims by finding them to be harmless error. See Wade v. Vasquez, 752 F.Supp. 931, 935-936. "[A] constitutional error can only be found harmless after a review of the entire record," Ruff v. Kincheloe, 843 F.2d 1240, 1242 (9th Cir. 1988). Most of the district court's harmless error rulings relied exclusively on the reasoning of the state supreme court. Accordingly, the court of appeals de novo review of the denial of the petition, Norris v. Risely, 878 F.2d 1178, 1180 (9th Cir. 1989), perforce included review of the entire state court and district court records. In this context, the "entire record" means "at least . . . the entire trial transcript." Ruff v. Kincheloe, 843 F.2d at 1243, n 5.

In addition, respondent Wade's claim that his principal counsel had a conflict of interest raised serious legal and factual issues outside the trial transcripts themselves. Thus, the court of appeals was required to review many of the district court pleadings, and evidence special counsel presented on the issue as well. Special counsel raised five separate legal arguments why principal counsel had a conflict of interest and why the district court had improperly disposed of the conflict issue. Serving the goal of judicial economy, and ensuring that all of respondent Wade's pending claims would be litigated in a single appellate proceeding, the remand by the court of appeals obviated a possible successive petition on the conflict of interest claim.

While the underlying appeal was pending, on or about March 9, 1992, this Court decided Stringer v. Black, 503 U.S. ___, 112 S.Ct.1130 (1993), which was significant authority relevant to the underlying appeal. The decision in Stringer led to supplemental briefing by the parties and the introduction of two amici curiae who also filed briefs and participated in oral argument. Notably, because of the number and complexity of issues before the court of appeal, and the multiple parties and amici curiae, the panel took the extraordinary measure of extending time for oral argument from forty-five to seventy minutes per side, and the actual arguments lasted over three hours.

The nature and complexity of the issues, as well as the chronology of events in the underlying appeal, involving fifteen briefs totaling approximately six hundred pages, undoubtedly required that after the oral argument the court of appeal review the entire record relevant to the issues presented for decision. The relevant record contains over twelve thousands pages of transcripts and other record documents. Finally, the proposition that this is a factually and legally complex matter is made manifest in the court of appeals' two-volume slip opinion, over eighty pages in length, which includes three diverse opinions that conflict on issues requiring interpretation of both facts and law that arise throughout the voluminous record.

In the context of the procedural history and substance of the underlying appeal, petitioner's claim that the panel refused to decide the matter or was dilatory in any respect, far from being clear and indisputable, is flatly contradicted. Rather, the considered opinions issued by the court of appeal demonstrate a fidelity to their duty under Blodgett to promptly resolve this matter after giving "full and fair consideration to all of the issues presented in the case." In re Blodgett, 502 U.S. ___, 116 L.Ed.2d 669, 112 S.Ct. 674, 676 (1992). Accordingly, the petition should be denied.

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II

A RULE REQUIRING THE NINTH CIRCUIT COURT OF APPEALS TO DECIDE DEATH PENALTY CASES WITHIN 120 DAYS AFTER ORAL ARGUMENT WOULD BE ARBITRARY, IMPRACTICAL, AND WOULD DISRUPT THE ORDERLY ADMINISTRATION OF JUSTICE

Without citation to authority, petitioner asks this Court to take the extraordinary measure of fashioning a rule requiring the court of appeals to decide habeas corpus death penalty cases within 120 days after oral argument. In addition to petitioner's failure to demonstrate the necessity of such a rule, (see part I, supra), this Court should reject petitioner's invitation for several other reasons.

First, petitioner relies upon irrelevant time periods to suggest a time limit of 120 days for the court of appeals to render decisions. Pet. at 20-21, n. 2. Pleading a case, with a right to amend prior to the filing of a responsive pleading, (see rule 11, Rules following 28 U.S.C. § 2254 and Fed. R. Civ. P. 15(a)), or discretionary jurisdictional decisions, are different tasks than deciding the merits of multiple constitutional claims.

Second, by insisting on a hard and fast time limit for decisions, petitioner refuses to acknowledge that death penalty cases, because of the finality in the nature of the punishment, are deserving of the closest scrutiny that can be given by the court of appeals. In any event, petitioner has failed to demonstrate that the time taken to decide respondent's appeal is so atypical for cases of this complexity as to permit an inference, let alone petitioner's thinly veiled allegation, that the court of appeals has deliberately chosen to delay the

adjudication of habeas corpus matters in death penalty cases. Petitioner's requested rule ignores the variables that may affect the amount of time necessary to decide an individual appeal, such as the size of the record or, as here, the issuance of multiple opinions by the individual judges. The arbitrary imposition of a time limit for decisions in capital habeas corpus proceedings assumes a uniformity of legal and factual issues that simply does not exist in these cases.

Finally, petitioner provides no persuasive rationale for imposing such an impractical time limit on the court of appeals. The procedural dynamic of the court of appeals, where individual judges sit on several different panels simultaneously, does not lend itself to an inflexible schedule, in a singular class of cases, such as that proposed by petitioner here. Under the rule petitioner seeks, judges hearing a large-record capital habeas corpus case involving multiple constitutional claims would undoubtedly be compelled to concentrate almost solely on that case, causing delay in their cases involving other panels of judges. Respondent Wade cannot predict to what extent such a rule would disrupt the orderly administration of justice in the court of appeals. That question is best left to the judges of respondent court of appeals. However, some significant disruption would take place if an inflexible time limit were mandated by this Court. Respondent Wade suggests that simple arithmetic evidences that this conclusion cannot be seriously disputed. Over one hundred death penalty habeas corpus cases

have come to the federal courts in the ninth circuit from California alone, more than three times the number of active judges.

Accordingly, a writ of mandamus is not the appropriate vehicle for promulgation of a rule such as the one sought by petitioner. This Court should resist seeking a "quick fix" to calendar management in the lower court that may ultimately create greater delays than those that petitioner alleges to have taken place in the underlying appeal here. Respondent Wade's principal counsel agrees with the sentiments expressed by special counsel as to a proper method for effecting change in the rules governing capital habeas corpus litigation. The petition for writ of mandamus should be denied.

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CONCLUSION

The appellate process will be ill-served by the rule which petitioner urges in these cases, for the haste in which they will be decided will surely lead to chaos in the court of appeals. The orderly administration of justice will be better served by conscientious, full and fair consideration of all issues presented by a habeas corpus petitioner so that all claims may be resolved in a single proceeding. The court of appeals never strayed from that path in the underlying appeal.

For all the reasons set forth above, the Court should deny the petition for the writ of mandamus.

DATED: May 23, 1994

Respectfully submitted,

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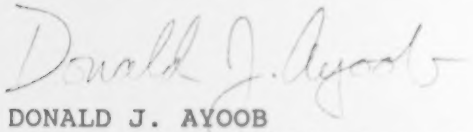

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